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ONTARIO CIVILIAN COMMISSION ON POLICE SERVICES

**REPORT OF AN INQUIRY
INTO THE
NEPEAN POLICE SERVICE**

JULY 1994

ONTARIO CIVILIAN COMMISSION ON POLICE SERVICES

REPORT OF AN INQUIRY INTO THE NEPEAN POLICE SERVICE

Presiding Members:

W.D. Drinkwalter, Q.C., Chairman
Raymond G. Leclair, Member

Commission Counsel:

Douglas Hunt, Q.C., with Andrew Burns

Appearances:

David Scott and Frank Tierney for Chief Phillips
James O'Grady and Ms. K. Young for the Nepean Police Services Board
Lawrence Greenspon and Judy Chan for the Gardner family

Hearing: May 10, 11, 1994

Background:

On December 6th, 1993 the Commission received a request from the Solicitor General to "... investigate, inquire into and report to me on the conduct of the members of the Nepean Police Services Board, the Chief of Police and any police officers involved in this matter". The matter referred to is the provision of assistance to the defence of Constable Monette who had been charged with manslaughter.

Section 25 of the Police Services Act, reproduced as Appendix 1, provides that this Commission may "... at the Solicitor General's request, ... or of its own motion, investigate, inquire into and report on, the conduct or the performance of duties of a municipal chief of police ... or a member of a Board ...".

The Commission considered the Solicitor General's request and decided to:



"... investigate, inquire into and report on the administration of the Nepean Police Service with respect to the provision of assistance in the defence of Constable Monette on a charge of manslaughter including:

1. the conduct and performance of duties of the members of the Nepean Police Services Board.
2. the conduct and performance of duties of the Chief of Police.

The Inquiry was conducted in Ottawa on May 10th and 11th, 1994.

Following is a list of the witnesses who testified:

Gerald Wayne Phillips - Chief of Police

Inspector Larry Gordon

Mayor Benson Arthur James Franklin - a member of the Board at the pertinent time

Sergeant Gerald Trudel - who assisted in the defence during the preliminary Inquiry

Constable Susan Postelthwaite - who acted as a personal support person for Constable Monette

Garth Anthony Gardner - the son of the deceased man

Councillor Alvin Carman Loney - member of the Board until September 1992

Ms. Jean Elaine Peart - present Chair of the Board (appointed September 1992 - Chair January 1994)

The Facts:

Constable Monette is a member of the Nepean Police Service. He was assigned to a joint forces drug investigation unit which involved several police forces and was led by the Ottawa Police Force. This unit had occasion to conduct what is commonly called a "drug raid" during which a civilian, Mr. Gardner, was shot. Mr. Gardner subsequently died.

The cause of Mr. Gardner's death is not clear to us but we did not inquire into the matter as it is not relevant to the purpose of this Inquiry.

The incident was investigated by the Special Investigations Unit which is a civilian investigating agency reporting to the Attorney General. Constable Monette was charged with manslaughter by this Unit.

The collective agreement between the Police Services Board and the Nepean Police Association provides that when a member of a force is charged with a crime arising from an incident which occurred while the member was engaged in the execution of duty, the Board will reimburse the officer for the cost of the defence if he or she is not found guilty.

A solicitor, who practices in Ottawa-Carleton, was retained but eventually Constable Monette became uncomfortable and as a result Chief Phillips took steps to retain Mr. Edward Greenspan from Toronto. Mr. Greenspan wanted certain investigations done and requested the assistance of a police officer for this purpose. Sergeant Trudel was assigned to work with Mr. Greenspan during the preliminary hearing. The preliminary hearing was conducted in June 1993 and lasted nine days. Constable Postelthwaite was in the courtroom with Constable Monette throughout the hearing, however she was acting in the capacity of a personal support person and played a very minor role in assisting the defence.

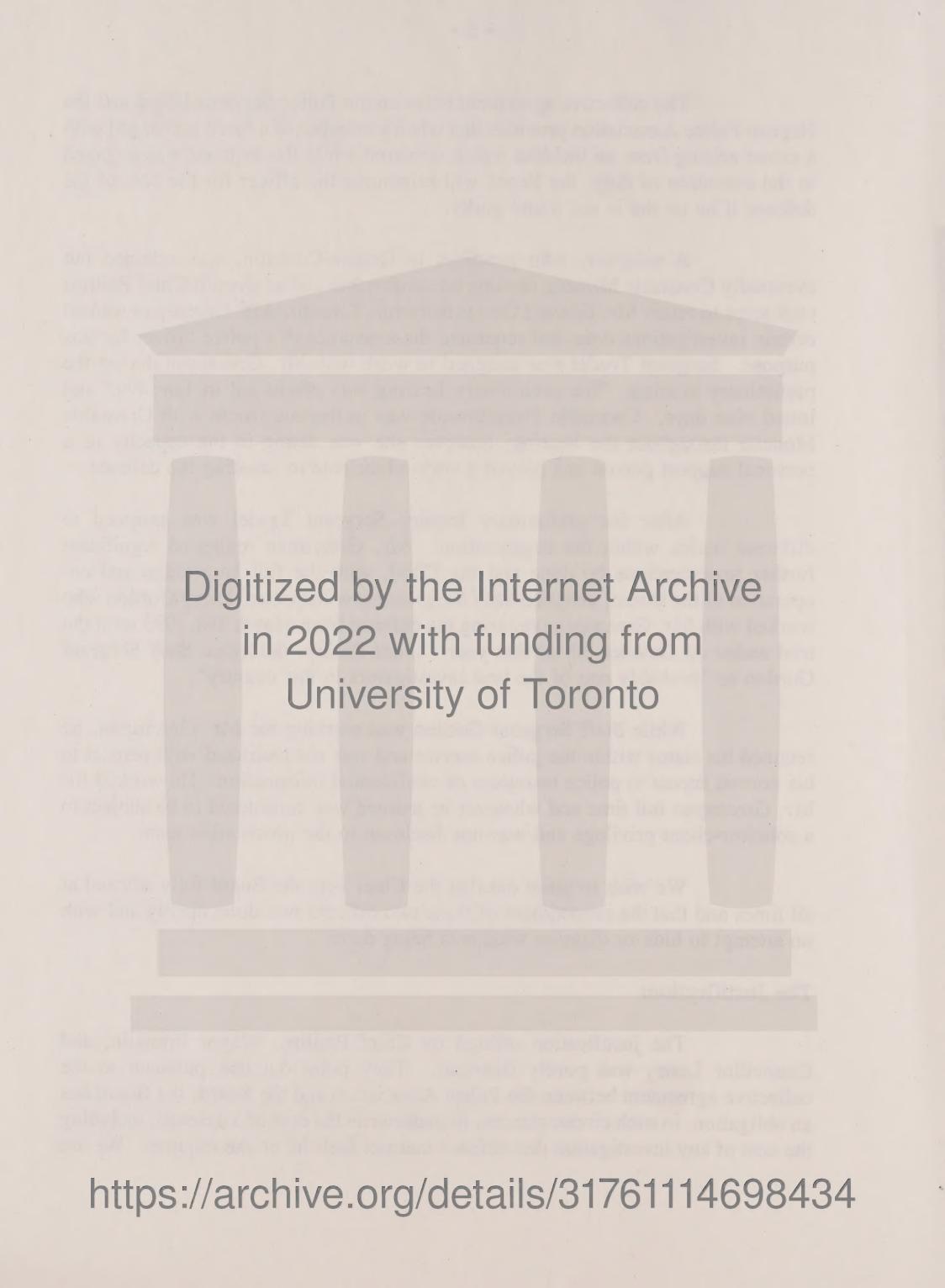
After the preliminary Inquiry Sergeant Trudel was assigned to different duties within the organization. Mr. Greenspan requested significant further investigations be done and the Chief, with the full knowledge and co-operation of the Board, assigned Staff Sergeant (now Inspector) Larry Gordon who worked with Mr. Greenspan preparing the defence from March 31st, 1993 until the trial ended on October 8th of that year. Chief Phillips described Staff Sergeant Gordon as "probably one of the best investigators in this country".

While Staff Sergeant Gordon was working for Mr. Greenspan, he retained his status within the police service and was not restricted with respect to his normal access to police resources or confidential information. He worked for Mr. Greenspan full time and whatever he learned was considered to be subject to a solicitor-client privilege and was not disclosed to the prosecution team.

We wish to point out that the Chief kept the Board fully advised at all times and that the secondment of these two officers was done openly and with no attempt to hide or disguise what was being done.

The Justification:

The justification offered by Chief Phillips, Mayor Franklin, and Councillor Loney was purely financial. They point out that pursuant to the collective agreement between the Police Association and the Board, the Board has an obligation, in such circumstances, to underwrite the cost of a defence, including the cost of any investigation that defence counsel feels he or she requires. We are



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prepared to accept that the cost of hiring a private investigator, had Mr. Greenspan done that, would exceed the monetary cost of assigning an investigator from within the organization. The real cost, in our view, is not monetary.

ANALYSIS

We were concerned about how much consideration the Chief and the Board gave to the public perception of this secondment. When we asked about this issue we were told that they had two concerns. First there was a concern about a perceived "conflict of interest" but it was decided that since the investigation of the shooting had been conducted by the Special Investigations Unit, an outside civilian agency, that there was no conflict in the Nepean Police assisting in the defence. The other concern was a question raised by one member of the Board about whether they were "breaking new ground" or setting a precedent of some sort. The Chief shared that concern initially but eventually advised the Board that this had been done previously in Peel Region and Metropolitan Toronto.

We have no knowledge of this sort of thing ever having been done before in the Province of Ontario.

We are concerned about the apparent lack of understanding, by the Chief and the then members of the Board, of the way the public might view such a secondment.

We were impressed by the evidence of Ms. Peart, the present Chair of the Board. She seems more alive to the public perception of the police service than some former members. She indicated to us that she believes the current Board is reflective of the community it serves and is able to measure "the pulse of the community". We find this encouraging.

In a free and democratic society the police function must be, and be perceived to be, impartial, objective, and fair. The public perception of this conduct was succinctly described by Garth Gardner, the son of the deceased. We were very impressed with this young man's obvious honesty and sincerity. He indicated that when he heard what had happened he felt "shocked", "very upset", "I felt betrayed." When asked how he feels today about the Nepean Police Service he, after a long pause, indicated that if he needed help today he would rather call the fire station than the police station. He has no confidence in the Nepean Police Service.

We share Mr. Gardner's feelings of shock and betrayal. The question that immediately occurs to a civilian is "would the police do this for me if I were charged with a criminal offence?" "Is this not a double standard?" "How can the police work to defend one person charged with a criminal offence when they do not do the same for everybody?"

It is much to Mr. Gardner's credit that even he, the son of the deceased, has no objection to the Board, as employer, paying for the defence of an employee in such a situation.

Part of the perception problem, but only part, flows from the belief that a police officer assisting the defence in a criminal matter would have access to resources not available to a private investigator, would have access to confidential information which is also not available to a private investigator and that the response of witnesses interviewed might well be different simply because the questioner is a police officer.

Cost of Defence:

Section 50(2) of the Police Services Act provides that the Board may indemnify a member for reasonable legal costs incurred in the defence of a criminal prosecution, "if the member is found not guilty."

Section 50(3) of the Police Services Act provides that the police force and the Board may, in an agreement, provide for indemnification for legal costs of members "except the legal costs of a member who is found guilty of a criminal offence ...".

It was pointed out to us that Article XXII of the Collective Agreement, Paragraph G, provides that where the Chief of Police elects to provide legal counsel ... the cost of such counsel is the Board's responsibility irrespective of the outcome of the proceedings ...". This clause is the result of an arbitration which was conducted well before the proclamation of the Police Services Act on December 31st, 1990, and has been carried forward in subsequent agreements. In our view this part of the agreement contravenes Section 50 of the Police Services Act and is thus void.

Conclusion:

The police cannot function properly, in a free and democratic society, without the support of the public. To justify and maintain that support they must be, and be perceived to be, impartial, objective, and fair. This conduct has made the Nepean Police Service appear to be partial, biased and unfair. In our opinion this act has done very significant damage to public trust in the police service.

Section 25 of the Police Services Act gives this Commission authority to suspend or remove a member of a Board or to demote, dismiss or retire a police officer. In the present case we do not propose to do anything of that nature for the simple reason that this situation has never happened before, so far as we are aware. But, with the distribution of this decision we anticipate that all Board members across the province and all chiefs of police will be aware of the serious consequences of such conduct. If it were to happen in future we would not be so forgiving.

Recommendation:

We recommend to the Solicitor General that all collective agreements in the province be examined to assure that they are in compliance with Section 50 of the Police Services Act.

Mayor Franklin and Councillor Loney both indicated to us that provincial guidelines would have been of assistance to them in reaching their decision. We also note that the new Chair of the Board, Ms. Peart, indicated that when this matter came to her attention, through the newspaper the day the trial concluded, she had called the Ministry of the Solicitor General and the Ontario Association of Police Services Boards in an attempt to ascertain whether there were any rules or guidelines relating to this behaviour, but of course there are none.

Not having done an exhaustive analysis of the problems that may arise when a police services board indemnifies a member for a criminal defence we are unable to make any specific recommendations. We do, however, recommend to the Solicitor General that such an analysis be done and that a standard or guideline be issued with respect to the indemnification in such situations and prohibiting the secondment of police personnel to a criminal defence team.

A Supplemental Issue:

During the Inquiry we became aware of another very disturbing situation. In making his final submissions Mr. O'Grady, who acted for the Board, suggested to us that the authorities in Nepean believed that what they did was in the best interests of Constable Monette "and the city" ...

In a memorandum to the Board dated June 30, 1992 Chief Phillips said, amongst other things:

"It is apparent to me that the province is coming at us with a major prosecutorial attack. They are utilizing two top crowns from Toronto as well as two junior lawyers as assistants. They intend to call expert witnesses from out west concerning the pathology findings which will demonstrate that victim Gardner's death was accelerated by the gunshot and in fact he did not die of cancer. They have indicated they will attempt to increase the charge or charges against Monette should the evidence warrant ...

I am confident that we are well represented in Edward Greenspan. This will not be a cheap exercise."

The comments of Mr. O'Grady and the words of the Chief to the Board suggest very clearly to us that the people in Nepean perceive that the province was attacking the City of Nepean and the Nepean Police Force when in fact this was an allegation of criminal conduct against one single individual. We are driven to conclude that there is a serious, and disturbing, rift between the provincial law enforcement and justice authorities on the one hand and the City of Nepean and its police force on the other. We hope that this is unique to this one municipality and not general across the province. We hope that the Solicitor General will share our concerns and conduct a serious examination of the existing relationship between the Ministries of the Solicitor General and Attorney General on the one hand and municipal authorities on the other.

DATED THIS 19th DAY OF JULY, 1994.

Raymond G Leclair

W. D. Drinkwaltor

per

W. D. Drinkwaltor

W.D. Drinkwaltor, Q.C., Chairman

SECTION 25
OF THE
POLICE SERVICES ACT

25.(1) The Commission may, at the Solicitor General's request, at a municipal council's request or of its own motion, investigate, inquire into and report on,

- (a) the conduct or the performance of duties of a municipal chief of police or other municipal police officer, an auxiliary member of a municipal police force, a special constable, a by-law enforcement officer or a member of a board;
- (b) the administration of a municipal police force;
- (c) the manner in which police services are provided for a municipality;
- (d) the police needs of a municipality.

(2) The cost of an investigation conducted at a council's request shall be paid by the municipality, unless the Solicitor General directs otherwise.

(3) The Commission shall communicate its report of an investigation under subsection (1) to the Solicitor General at his or her request and to the board or council at its request, and may communicate the report to any other person as the Commission considers advisable.

(4) If the Commission concludes after a hearing that a member of a police force is not performing or is incapable of performing the duties of his or her position in a satisfactory manner, it may direct that the member be,

- (a) demoted as the Commission specifies, permanently or for a specified period;
- (b) dismissed; or
- (c) retired, if the member is entitled to retire.

- (5) If the Commission concludes, after a hearing, that a member of a board is guilty of misconduct or is not performing or is incapable of performing the duties of his or her position in a satisfactory manner, it may remove or suspend the member.
- (6) A member of a police force or of a board on whom a penalty is imposed under subsection (4) or (5) may appeal to the Divisional Court within thirty days of receiving notice of the Commission's decision.
- (7) An appeal may be made on a question that is not a question of fact alone, or from a penalty, or both.
- (8) If the Commission suspends a member of a board or removes him or her from office, the municipal council or the Lieutenant Governor in Council, as the case may be, shall appoint a person to replace the member.
- (9) A member who has been removed shall not subsequently be a member of any board, and a member who has been suspended shall not be reappointed during the period of suspension.

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